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Federal Communications Commission
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March 23, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

cc 98-84

Re: Petition for Declaratory Ruling Or, In the Alternative, For
Rulemaking on Defining Certain Incumbent LEC Affiliates as
Successors, Assigns, or Comparable Carriers Under Section
251(h) of the Communications Act

Dear Ms. Salas:

On behalf of Competitive Telecommunications Association, the Florida
Competitive Carriers Association and the Southeastern Competitive Carriers Association,
enclosed for filing is the Petition for Declaratory Ruling or, in the Alternative, for
Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or
Comparable Carriers Under Section 251(h) of the Communications Act.

If you have any questions, please feel free to call me.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for the Competitive
Telecommunications Association, the
Florida Competitive Carriers Association,
and the Southeastern Competitive
Carriers Association

Enclosures

cc: Attached service list

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

Competitive Telecommunications Association,)
Florida Competitive Carriers Association,)
and Southeastern Competitive Carriers Association)
Petition On Defining Certain Incumbent LEC Affiliates)
As Successors, Assigns, or Comparable Carriers)
Under Section 251(h) of the Communications Act)

98-84

PETITION FOR DECLARATORY RULING
OR, IN THE ALTERNATIVE, FOR RULEMAKING

COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION,
FLORIDA COMPETITIVE CARRIERS
ASSOCIATION, and
SOUTHEASTERN COMPETITIVE
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Association

Dated: March 23, 1998

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Petition On Defining Certain Incumbent LEC Affiliates)
As Successors, Assigns, or Comparable Carriers)
Under Section 251(h) of the Communications Act)

**PETITION FOR DECLARATORY RULING
OR, IN THE ALTERNATIVE, FOR RULEMAKING**

The Competitive Telecommunications Association ("CompTel"), the Florida Competitive Carriers Association ("FCCA"), and the Southeastern Competitive Carriers Association ("SECCA"), pursuant to Sections 1.2 and 1.401 of the Commission's rules, 1/ request either a declaratory ruling or a rulemaking regarding the regulatory status of affiliates 2/ of incumbent local exchange carriers ("ILECs") -- such as BellSouth's affiliate, BellSouth BSE, Inc. ("BellSouth BSE") -- that provide wireline local exchange or exchange access service within the ILEC's service territory using the same or a similar brand name and common financial resources, personnel, and/or other resources of the ILEC or another corporate affiliate.

1/ 47 C.F.R. §§ 1.2, 1.401.

2/ In this petition, the term "affiliate" has the meaning defined in 47 U.S.C. § 153(1).

First, the Commission should issue a declaratory ruling that an ILEC affiliate that operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC's region will be considered a "successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act ("Act"), and consequently that the affiliate itself is subject to the obligations of ILECs under Section 251(c). ^{3/} The Commission also should issue a declaratory ruling that such a CLEC affiliate will be treated as a "dominant carrier" for the provision of interstate service.

In the alternative, CompTel, FCCA, and SECCA request that the Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate that provides wireline local exchange or exchange access service within the ILEC's service area under the same or a similar brand name is a "comparable" carrier under Section 251(h)(2). Such an affiliate would thus be subject to the Section 251(c) interconnection obligations of ILECs. That rulemaking proceeding should determine the criteria under which an in-region ILEC affiliate will be considered a "comparable carrier" under Section 251(h)(2).

BellSouth and other ILECs are transferring resources to affiliated companies to provide local and other telecommunications services within their service areas, and -- unless the Commission takes the requested actions -- could use these affiliates to avoid complying with important aspects of Section 251(c). A

^{3/} 47 U.S.C. § 251(c) & (h)(1)(B)(ii). As discussed below, such status as a "successor or assign" could be a rebuttable presumption.

declaratory ruling that such affiliates are "successors or assigns" would prevent such abuse and make it clear that the statutory dictates of Section 251(c) must be obeyed. A rule that such affiliates are "comparable carriers" would have the same result. And, as we demonstrate below, either the declaratory ruling or the rulemaking decision we seek would be fully consistent with the Act and with the Commission's precedent. 4/

(We note that CompTel, FCCA, and SECCA have no objections to an ILEC's establishing a CLEC affiliate to operate *outside* the ILEC's service territory, and we believe that these entities should *not* be treated as ILECs to the extent that they operate outside their ILEC affiliate's service territory. Such entry by an ILEC affiliate into another ILEC's territory is exactly the kind of competition that the Telecommunications Act of 1996 was intended to stimulate.)

I. THE COMMISSION SHOULD NOT COUNTENANCE ILECS' ATTEMPTS TO CIRCUMVENT THEIR INTERCONNECTION OBLIGATIONS BY ESTABLISHING SO-CALLED "CLEC" IN-REGION AFFILIATES.

A number of ILECs are establishing affiliated companies to operate, purportedly, as "competitive local exchange carriers" ("CLECs") within the ILECs'

4/ LCI International Telecom Corp. ("LCI") recently filed a petition in which it proposed a novel form of structural separation that would establish a voluntary "fast track" for Bell operating companies to comply with Section 271. LCI proposes that the retail affiliate of an ILEC that complies with the LCI plan would be deemed *not* to be a "successor," "assign," or "comparable" carrier under Section 251(h). *Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings* at 47-49 (filed Jan. 22, 1998). Without addressing the merits of LCI's proposals in this context, we note that LCI's arguments regarding Section 251(h) are fully consistent with the relief sought in this petition.

service areas. For example, BellSouth has set up an entity called "BellSouth BSE" which is intended to operate as a lightly-regulated CLEC both within and outside the operating territory of BellSouth Telecommunications (the ILEC corporate entity). BellSouth BSE has obtained, or is seeking, state certification to provide local telephone service in a number of states, including some states outside the BellSouth region, as well as statewide certification in every state in BellSouth's region. ^{5/} BellSouth states that BellSouth BSE will offer integrated packages of services, including local, wireless, Internet, and (once authorized) interLATA long distance services, to large business customers, and will offer local service primarily by reselling the services of BellSouth Telecommunications, which it will obtain through Section 252 interconnection agreements. ^{6/}

^{5/} In addition to BellSouth's home states of Florida, South Carolina, North Carolina, Georgia, Mississippi, Kentucky, Alabama, Louisiana, and Tennessee, BellSouth BSE also has sought operating authority in Virginia, Ohio, Illinois, Indiana, and Hawaii. South Carolina Public Service Commission, *In re Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service in the State of South Carolina*, Docket No. 97-361-C, Hearing No. 9703 (November 5, 1997) ("SC PSC Hearing No. 9703"), Direct Examination of Robert C. Scheye, Vice President, Supplier Development and Business Relations for BellSouth BSE, Inc., at Tr. 3. Similarly, Ameritech, GTE, Pacific Bell, SNET, and others are establishing so-called CLEC in-region affiliates.

^{6/} Florida Public Service Commission, *In re Application for Certificate to Provide Alternative Local Exchange Telecommunications Service by BellSouth BSE, Inc.*, Docket No 971056-TX, Agenda Conference (October 7, 1997) ("FL PSC Agenda Conference") at Tr. 9 (statement of Harry Lightsey, General Counsel of BellSouth BSE, Inc.); South Carolina Public Service Commission, *In re Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Service in the State of South Carolina*, Docket No. 97-361-C, Order No. 97-1063 (Dec. 23, 1997) at Tr. 6 ("SC PSC Order"); SC PSC Hearing No. 9703, Direct Testimony of Scheye at Tr. 4-5, Cross Examination of Scheye at Tr. 17, 19, 63-65, 74-75; Alabama Public Service Commission, *In re*

In on-the-record testimony in state proceedings, BellSouth representatives have admitted the following:

- BellSouth BSE is ultimately wholly owned by the same corporate entity that owns the BellSouth ILEC. 7/
- BellSouth BSE will present itself to customers using the same corporate name, logo, and other indicia of corporate identity as BellSouth Telecommunications, without paying BellSouth Telecommunications or its ratepayers anything for this use of corporate goodwill; 8/
- BellSouth BSE will be capitalized and funded entirely by BellSouth Corp., the holding company which also owns BellSouth Telecommunications, and will have access to the same capital and borrowing power as BellSouth Telecommunications, secured in substantial part by the assets and expected future earnings of BellSouth Telecommunications; 9/
- Certain high-level staff members, including some who had responsibility for negotiating interconnection agreements with independent CLECs, have been transferred from BellSouth Telecommunications to BellSouth BSE. 10/

BellSouth BSE, Inc., Docket No. 26192, Hearing (Nov. 19, 1997) ("AL PSC Hearing"), Direct Examination of Scheye at Tr. 17-19, Cross Examination of Scheye at Tr. 94-95.

7/ AL PSC Hearing, Cross Examination of Scheye at Tr. 40; SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 45.

8/ SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 16-17, 24-25, 76-77; AL PSC Hearing, Cross Examination of Scheye at Tr. 86-92.

9/ SC PSC Hearing No. 9703, Direct Testimony of Scheye at Tr. 12, Cross Examination of Scheye at Tr. 57-58; AL PSC Hearing, Direct Examination of Scheye at Tr. 16, *see also* SC PSC Order at Tr. 5.

10/ SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 42-43; AL PSC Hearing, Cross Examination of Scheye at Tr. 32, 55-57.

These and other factors demonstrate that BellSouth BSE is an alter ego that is in reality indistinguishable from BellSouth and BellSouth Telecommunications. Moreover, they show that BellSouth is transferring important resources, such as corporate goodwill, financing, and human capital, from BellSouth Telecommunications to BellSouth BSE. And we believe that BellSouth is not alone in this regard, and that such conduct is typical of the ILECs that are creating so-called CLEC affiliate companies.

When such a so-called CLEC entity provides service within its affiliated ILEC's local service territory using resources transferred from the ILEC (or from a parent company or other ILEC affiliate), it in effect could enable the ILEC to avoid complying with important provisions of Section 251. In the near term, the most likely provision to be violated is the resale requirement of Section 251(c)(4). For example, the so-called CLEC entity (BellSouth BSE) has stated that it plans, in particular, to target medium to large business customers, including those currently served by the ILEC corporate entity (BellSouth Telecommunications). ^{11/} By doing so, BellSouth would effectively transfer the customer-specific contract service arrangements ("CSAs") offered to those customers from itself to a nonregulated affiliate, thus exempting such CSAs from the Section 251(c)(4) requirement that these arrangements be offered to requesting carriers at a wholesale discount. ^{12/}

^{11/} SC PSC Hearing No. 9703, Cross Examination of Scheye at Tr. 61-62.

^{12/} 47 U.S.C. § 251(c)(4); 47 C.F.R. §§ 51.605, 51.613.

The Commission has already found that "BellSouth . . . appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs. By foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition in South Carolina." ^{13/} Now that the Commission has made it clear that CSAs are subject to the statutory resale obligation, BellSouth appears to be trying a new approach to "hindering local exchange competition" -- shifting CSA customers from BellSouth Telecommunications to BellSouth BSE. ^{14/}

The Commission should take decisive action to prevent this evasion of statutory obligations by BellSouth and other ILECs, by issuing a declaratory ruling and/or issuing a rule that so-called CLEC affiliates of ILECs providing in-region local service using resources transferred from the ILECs are to be treated as dominant ILECs under Section 251(h), and will be subject to the resale and other interconnection obligations of ILECs.

^{13/} *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, CC Docket No. 97-208, Memorandum Opinion And Order, FCC 97-418, ¶ 224 (released Dec. 24, 1997). *See generally id.*, ¶¶ 215-24 (rejecting BellSouth's Section 271 application in part due to its failure to offer wholesale discounts on CSAs, as required by Sections 251(c)(4) and 271(c)(2)(B)(xiv)); *Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, FCC 98-17, ¶ 63 (released Feb. 4, 1998) (same).

^{14/} In the longer term, ILECs could also attempt to use such affiliated entities to avoid complying with the unbundled network element ("UNE") requirements of Section 251(c)(3) and other interconnection obligations.

II. AN IN-REGION "CLEC" USING RESOURCES TRANSFERRED FROM ITS ILEC AFFILIATE SHOULD BE TREATED AS A "SUCCESSOR" OR "ASSIGN" UNDER SECTION 251(h)(1) AND AS A DOMINANT CARRIER.

The Commission should adopt a declaratory ruling that an ILEC affiliate providing local service within the ILEC's service territory using resources transferred from the ILEC is a "successor" or "assign" of the ILEC under Section 251(h)(1) and is a dominant carrier for the provision of interstate access and other interstate services. Such a declaratory ruling would resolve the current uncertainty over the regulatory status of these affiliates under Section 251(h)(1). And such a ruling would advance the public interest, by preventing an ILEC from abusing the corporate form of an in-region "CLEC" affiliate to avoid its interconnection and resale obligations 15/ as well as regulation as a dominant carrier.

The declaratory ruling sought by CompTel, FCCA, and SECCA is compelled by the statutory language of Section 251(h)(1). Section 251(h)(1) includes in the definition of "incumbent local exchange carrier" any "person or entity that, on or after such date of enactment, became a successor or assign" of an ILEC that provided telephone exchange service in an area on that date and was a member of the National Exchange Carrier Association ("NECA"). 16/

15/ See *supra* Section I.

16/ 47 U.S.C. § 251(h)(1)(B)(ii). See also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22055, ¶ 312 (1996) ("*Non-Accounting Safeguards Order*") (interpreting Section 251(h)(1)); Order on Reconsideration, FCC 97-52 (rel. Feb. 19, 1997); Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *petition for review denied sub. nom. Bell Atlantic v. FCC*, No. 97-1432 (D.C. Cir. Dec. 23,

First, the plain meaning of Section 251(h)(1) requires treating a corporate entity that is an ILEC's "affiliate," as defined in Section 3(1), and that provides telephone exchange service in the same areas as the ILEC under the same or a similar brand name and using resources transferred from the ILEC, as a "successor" or "assign" of that ILEC. An affiliated entity (such as BellSouth BSE) should be considered a "successor" of the ILEC under Section 251(h)(1) when it uses the same resources (brand name, financial resources, and/or human capital) in providing telephone exchange service to certain customers in the ILEC's local service area. In such cases, the affiliate essentially has replaced or "succeeded" the ILEC corporate entity. Such an entity should be treated as an "assign" of the ILEC under Section 251(h)(1) because the ILEC has transferred or "assigned" to it significant attributes of the ILEC, including corporate identity, financing, human capital, and at least part of the ILEC's customer base.

These interpretations of the meaning of the terms "successor" and "assign" are consistent with the common understanding of the terms in other fields of law: A corporate affiliate that is under common ownership and/or control of a company, using the same base of employees and/or other resources, and providing the same services in the same geographic area as that company, will be treated as a "successor" or "assign" to that company, and subject to certain of the company's

1997); *petition for review pending sub nom. SBC Communications v. FCC*, No 97-1118 (D.C. Cir. filed March 6, 1997) (held in abeyance pursuant to court order issued May 7, 1997).

legal obligations. 17/ Likewise, an affiliate will be considered the “successor” of a company if the formation of the affiliate involves “a mere technical change in the structure or identity” of the original entity “without any substantial change in its ownership or management.” 18/ This is particularly true where, as here, the formation of the affiliate appears to be intended to avoid the effect of a law. 19/

Moreover, the declaratory ruling requested by CompTel, FCCA, and SECCA is not inconsistent with the Commission’s decisions regarding successors and assigns in the *Non-Accounting Safeguards Order*; 20/ indeed, it is a logical next step from that *Order*. The Commission concluded that, for purposes of Section 272 of the Act, an affiliate to which a Bell operating company (“BOC”) has transferred network assets will be treated as a “successor or assign” of the BOC, and thus will be subject to the same Section 272 obligations as the BOC itself. 21/ For similar

17/ See, e.g., *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-46 (1987) (affirming agency decision to deem a new entity a “successor” of, and thus subject to certain labor relations obligations that applied to, the pre-existing enterprise, when the new entity “acquired substantial assets of its predecessor[,]” a majority of the new entity’s employees had been employees of the predecessor firm, the new entity served a substantially overlapping customer base, and the new entity provided the same goods or services as the predecessor firm); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170-72, 183 n.5 (1973) (“*Golden State*”) (same).

18/ *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel and Restaurant Employees and Bartenders Int’l Union, AFL-CIO*, 417 U.S. 249, 259 n.5 (1974) (“*Howard Johnson*”). See also *Golden State*, 414 U.S. at 176-77.

19/ *Howard Johnson*, 417 U.S. at 259 n.5.

20/ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054-55, ¶¶ 309-11.

21/ *Id.*

reasons, an affiliate to which an ILEC has transferred anything that would be of value in providing in-region local service, such as brand name, capital, or personnel, should be treated as a “successor or assign” (or, as we discuss below, a “comparable” carrier) 22/ and should be subject to the same Section 251 obligations as the ILEC itself.

To be sure, the Commission stated in the *Non-Accounting Safeguards Order* that “a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) *solely* because it offers local exchange service; rather, 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).” 23/ But the *Non-Accounting Safeguards Order* does not address how the Section 251(h) criteria for treating affiliated entities as ILECs would be satisfied. 24/ The Commission should clarify, by issuing the requested declaratory ruling, that Section 251(h)(1) will be triggered if the ILEC affiliate is providing wireline local exchange or exchange access service in the ILEC’s region under the same or similar brand names. 25/

22/ See *infra* Section III.

23/ *Id.* at 22055, ¶ 312 (emphasis added).

24/ Nor did the Commission consider whether the analysis would be different for affiliates providing in-region and out-of-region services. CompTel, FCCA, and SECCA would contend that an ILEC affiliate providing local service outside the ILEC’s service territory should *not* be classified as an ILEC under Section 251(h). See *supra* at 3.

25/ In particular, CompTel, FCCA, and SECCA recommend that the Commission adopt, by declaratory ruling, a rebuttable presumption that “successor or assign” status will apply, unless the presumption is rebutted, to any entity that: (1) is an “affiliate” of an ILEC under the definition in Section 3(1) of the Act; (2) is providing

Finally, the Commission should, by declaratory ruling, hold that such in-region "CLEC" affiliates of ILECs will, unless the presumption is rebutted, be treated as dominant carriers with respect to interstate access service and any other jurisdictionally interstate services that they provide. As ILECs themselves (or as ILEC "successors" or "assigns"), these entities fall squarely within the Commission's existing determinations of which carriers have market power. 26/ And, while the Commission did decide in the *Regulatory Treatment Order* to treat as non-dominant the affiliates of BOCs and other ILECs that provide stand-alone, in-region interstate *long-distance* service, 27/ that decision has no relevance to the treatment of these *local* affiliates' in-region interstate services, such as interstate access. The decision in the *Regulatory Treatment Order* was based in large part on the rationale that an affiliate of a BOC or other ILEC that begins providing in-region long-distance service will be a newcomer in a maturely competitive marketplace. 28/ By

local exchange or exchange access service on a wireline basis in any geographic area served by the ILEC; and (3) uses any corporate or brand names that are the same or similar to those of the ILEC affiliate. The burden would be on the ILEC affiliate to rebut this presumption and show that it is not a "successor or assign" of the ILEC.

26/ See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 20-22 (1980).

27/ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (released Apr. 18, 1997) ("*Regulatory Treatment Order*"). That decision also did not address the regulatory treatment of bundled, "full-service" offerings that include both local and long-distance service.

28/ See, e.g., *id.* at ¶ 96.

contrast, in this case the "CLEC" affiliate will be providing the same interstate access and other local services that the ILEC itself provides on a near-monopoly basis, and the affiliate entity will be largely indistinguishable from the ILEC itself. It therefore should be treated as a dominant carrier, and should be subject to the same access charge, price cap, and other rules that apply to ILECs.

III. THE COMMISSION SHOULD ADOPT A RULE THAT AN ILEC AFFILIATE PROVIDING IN-REGION LOCAL SERVICE USING RESOURCES TRANSFERRED FROM THE ILEC IS A "COMPARABLE" CARRIER UNDER SECTION 251(h)(2).

As an alternative to the declaratory ruling discussed above, the Commission should initiate a proceeding to establish a rule clarifying the criteria under which an ILEC's affiliate will be considered a "comparable" carrier to the ILEC under Section 251(h)(2). Specifically, CompTel, FCCA, and SECCA propose that the Commission adopt a rule that an ILEC-affiliated carrier will be treated as a "comparable" carrier if it provides local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate. 29/

Section 251(h)(2) provides that the Commission may treat a LEC (or category of LECs) as an ILEC if-

- (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

29/ The same rebuttable presumption discussed above could be employed. See *supra* note 25.

- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section. 30/

An ILEC affiliate using the ILEC's identity and other resources to provide the same basic local services as the ILEC in the same geographic areas as the ILEC is, for all practical purposes an *alter ego* of the ILEC. Accordingly, such an entity should be deemed to meet the criteria to be considered a "comparable" and treated as an ILEC under each of the elements listed in Section 251(h)(2).

First, such a so-called CLEC entity occupies a position in the market that is not only comparable, but virtually identical, to the position occupied by its affiliate ILEC. For example, BellSouth BSE holds itself out using the same brand, the same logo, and even some of the same personnel as BellSouth Telecommunications. Under these circumstances, customers would not perceive any substantive difference between BellSouth BSE and BellSouth Telecommunications.

Second, for similar reasons, the new so-called CLEC affiliate "has substantially replaced" the ILEC with respect to the customers it serves in the ILEC's service area using resources transferred from the ILEC. To the extent that an ILEC believes it can provide service on a deregulated basis through a CLEC affiliate, it is likely to focus its marketing efforts, particularly with respect to large customers who might be candidates for CSAs. For this customer base, and more generically if the so-called CLEC affiliate markets its services more broadly, the

30/ 47 U.S.C. § 251(h)(2).

new entity has “substantially replaced” the ILEC for the customers it targets and serves.

Third, the public interest, convenience, and necessity would be served by treating these affiliated entities as ILECs in order to prevent ILECs from using these corporate entities to circumvent and avoid complying with the pro-competitive, market-opening provisions of Section 251(c), such as the obligation to offer CSAs and other retail offerings to resellers on a discounted wholesale basis. 31/

CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling that, to the extent that an affiliate of an ILEC provides local telephone service within the ILEC’s service area using resources transferred from the ILEC, that affiliate itself will be treated as a “successor” or “assign” of the ILEC under Section 251(h)(1), and as a dominant carrier. In the alternative, the Commission should propose a rule that such an ILEC affiliate be classified as a “comparable”

31/ See *supra* Section I.

carrier under Section 251(h)(2). In both cases, the ILEC-affiliated carrier should be subject to the interconnection obligations of ILECs under Section 251(c) of the Act.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION,
FLORIDA COMPETITIVE CARRIERS
ASSOCIATION, and
SOUTHEASTERN COMPETITIVE
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Telecommunications Association, the
Florida Competitive Carriers Association,
and the Southeastern Competitive Carriers
Association

Dated: March 23, 1998

ATTACHMENT

**DIRECT TESTIMONY
OF
JOSEPH GILAN**

ON BEHALF OF

**FLORIDA COMPETITIVE CARRIERS ASSOCIATION,
AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.,
AND
MCI TELECOMMUNICATIONS CORPORATION**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In re: Application for certificate
to provide alternative local
exchange telecommunications
service by BellSouth BSE, Inc.**

**) Docket No. 971056-TX
)
)
)
)**

DIRECT TESTIMONY

OF

JOSEPH GILLAN

ON BEHALF OF

**FLORIDA COMPETITIVE CARRIERS ASSOCIATION,
AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC.,
AND
MCI TELECOMMUNICATIONS CORPORATION**

Direct Testimony of
Joseph Gillan
on behalf of the
Florida Competitive Carriers Association,
AT&T Communications of the Southern States, Inc.,
and
MCI Telecommunications Corporation

1 **Q. Please state your name, business address and occupation.**

2

3 A. My name is Joseph Gillan. My business address is P.O. Box 541038, Orlando,
4 Florida 32854. I am an economist with a consulting practice specializing in
5 telecommunications.

6

7 **Q. Please briefly outline your educational background and related experience.**

8

9 A. I am a graduate of the University of Wyoming where I received B.A. and M.A.
10 degrees in economics. From 1980 to 1985, I was on the staff of the Illinois
11 Commerce Commission where I had responsibility for the policy analysis of
12 issues created by the emergence of competition in regulated markets, in
13 particular the telecommunications industry. While at the Commission, I served
14 on the staff subcommittee for the NARUC Communications Committee and
15 was appointed to the Research Advisory Council overseeing NARUC's research
16 arm, the National Regulatory Research Institute.

17

18 In 1985, I left the Commission to join U.S. Switch, a venture firm organized to
19 develop interexchange access networks in partnership with independent local

1 telephone companies. At the end of 1986, I resigned my position of Vice
2 President-Marketing/Strategic Planning to begin a consulting practice.

3
4 Over the past decade, I have provided testimony before more than 25 state
5 commissions, four state legislatures, the Commerce Committee of the United
6 States Senate, and the Federal/State Joint Board on Separations Reform. I
7 currently serve on the Advisory Council to New Mexico State University's
8 Center for Regulation.

9
10 **Q. On whose behalf are you testifying?**

11
12 A. I am testifying on behalf of AT&T Communications of the Southern States Inc.
13 (AT&T), MCI Telecommunications Corporation (MCI), and the Florida
14 Competitive Carriers Association (FCCA). The FCCA is an association with a
15 broad membership, committed to the development of competition across all
16 services and all areas of Florida.

17
18 **Q. Please explain the fundamental issue in this proceeding.**

19
20 A. There is really a single issue of importance to this proceeding: just how many
21 BellSouths does it take to provide local service in its own territory? In the
22 testimony which follows, I explain that because *consumers* will discern only

1 one BellSouth -- and *investors* will evaluate a single BellSouth -- no valid
2 purpose would be accomplished by a regulatory system that pretends that there
3 are two. The Commission should reject BellSouth's request for a second local
4 certificate in its own territory.

5
6 **Q. Please identify the various BellSouths referenced in this proceeding.**

7
8 **A.** To make more clear the discussions which follow, I refer to (and distinguish
9 between) the three principal BellSouths with the following nomenclature:

10
11 (1) BellSouth, refers to the holding company which is the single
12 entity of economic relevance to investors and the only point at
13 which BellSouth's management is judged,

14
15 (2) BellSouth Telecommunications (BellSouth-T), is the existing
16 local exchange carrier providing service in Florida, and

17
18 (3) BellSouth-BSE, is the "new" local exchange carrier seeking
19 authority in this proceeding to compete as a competitive ALEC.

20
21 (In addition to being the incumbent local exchange carrier, BellSouth-T
22 applied for and received an ALEC certification.)

1 **Q. Please summarize the purpose of your testimony.**

2

3 A. The purpose of my testimony is to explain why the Commission should deny
4 BellSouth a certificate to "compete against itself" through the legal artifice of
5 BellSouth-BSE. By requesting a certificate as an Alternate Local Exchange
6 Carrier (ALEC), BellSouth is seeking a form of back-door deregulation that
7 would be every bit as effective as if the company had directly requested that
8 the Commission repeal the Telecommunications Act of 1996, Chapter 364, and
9 rewrite its rules to eliminate the distinction between BellSouth and legitimate
10 entrant-competitors.

11

12 I want to make clear at the outset, however, that the carriers sponsoring my
13 testimony have no objection to BellSouth's entry and participation as an ALEC
14 outside its own territory. As BellSouth-BSE seeks to win and serve the
15 customers of GTE and Sprint, BellSouth-BSE will exist as a distinct competitor
16 to these incumbent LECs, with a unique market presence and an economic
17 relationship no different than any other entrant.

18

19 Within BellSouth-T's territory, however, BellSouth-BSE is a sham entrant, a
20 second BellSouth indistinct from the incumbent LEC. In every meaningful
21 way, BellSouth-BSE is BellSouth-T. The sole purpose for BellSouth-BSE is to
22 engage in market behavior that BellSouth-T is not, for good reason, allowed --